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No. 95-740

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the $2 million punitive exaction in this case, which is at least 137 times the economic harm suffered by respondent, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Union Security Life Insurance Company (hereinafter "Union Security")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra,* 1a-13a) is not yet reported. The orders of the Circuit Court of Choctaw County (App., *infra,* 14a-31a) are unreported.

JURISDICTION

The Supreme Court of Alabama issued an opinion in this case on July 14, 1995. After Union Security timely filed an application for rehearing, the Supreme Court of Alabama issued a modified opinion and overruled the application on September 8, 1995 (App., *infra,* 1a-13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

The Court has granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, to consider, among other things, whether the $2 million punitive damages award in that case is so excessive as to violate due process. The present petition raises a virtually identical issue. Accordingly, the Court should hold the petition for disposition as appropriate in light of its decision in *BMW.* See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993).

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[1] Union Security is a wholly owned subsidiary of American Security Insurance Company. Union Security has no subsidiaries.

1. *Union Security's Credit Life Insurance Business.* Union Security sells a range of credit-related insurance products, including group credit life insurance, the purpose of which is to pay off the balance of a loan in the event an insured debtor dies during the term of the loan. R. 374, 530.[2] Generally, group credit life is sold by the lender to the debtor pursuant to an agency contract with the insurance company. App., *infra,* 2a. During the time period relevant to this case, First Alabama Bank and its loan officers were authorized to sell group credit life on behalf of Union Security. App., *infra,* 3a; R. 302, 476.[3] The premiums for credit life insurance offered in Alabama by Union Security or any other insurer must be approved by the State of Alabama. R. 373.

During the period relevant to this case, Union Security required that all individuals seeking credit life insurance for First Alabama loans exceeding $10,000 fill out a one-page form entitled "Statement of Debtor's Physical Condition" (hereinafter "Health Statement"). App., *infra,* 3a; R. 483. The form, as it existed at the relevant time, asked whether the debtor had experienced any of the following nine conditions within the preceding five years: cancer, diabetes, epilepsy, high blood pressure, heart disease, respiratory disorder,

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[2] The designation "R. ___" refers to the Reporter's Transcript of the trial below. The designation "C. ___" refers to the Clerk's Record, which is comprised of pleadings, motions, memoranda of law, and trial exhibits. The designation "Supp. C. ___" refers to the Supplemental Record on Appeal, which is comprised of an affidavit made part of the record by the Alabama Supreme Court.

[3] First Alabama Bank is a state-wide bank that purchased Choctaw Bank in 1986 and merged operations with it in 1988. R. 734. Union Security's contract was with First Alabama Bank, but only First Alabama Bank of Choctaw was named as a defendant in this case. For purposes of this petition, the term "First Alabama" will refer to the broader entity, and the term "First Alabama, Choctaw" will refer to the specific defendant.

kidney disease, nervous disorder, and digestive disorder. For each condition, the form contained a box labeled "YES" and a box labeled "NO." For any "YES" answers, the form requested details of treatment, dates, diseases treated, and the treating physician's name and address. Directly beneath that disclosure section, the form contained the following certification: "I hereby declare that, to the best of my knowledge and belief, I am now in good health and that I have read the above questions and that the answers thereto are true and correct." Near the bottom of the page was a line for the debtor's signature. See C. 326.

It is Union Security's uniform policy to deny insurance to any debtor who has checked the "YES" box for any of the nine listed medical conditions. App., *infra,* 3a; R. 300-301, 342-343, 509, 522-523. On the other hand, if all nine "NO" boxes are checked, Union Security takes the applicants at their word and authorizes issuance of coverage. App., *infra,* 3a; R. 301, 304-305, 351-353.

Union Security does not conduct an independent investigation of the accuracy of the Health Statements before authorizing issuance of coverage (no doubt because the vast majority of Health Statements are accurate). App., *infra,* 3a; R. 305, 306.[4] If, however, the debtor dies within the policy's one-year contestability period,[5] and if the cause of death appears to be related to one of the conditions listed on

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[4] Union Security receives between 2,000 and 6,000 Health Statements per month. R. 299, 423. The cost of verifying each one of them would be prohibitive, especially when, as here, the premiums and benefits are relatively small.

[5] A contestability period is the amount of time in which an insurance company may contest the validity of the insurance contract based on misstatements on the application. If a policy has a one-year contestability period and the insured lives for more than a year after coverage commences, the coverage becomes incontestable without regard to whether the application contained any material misstatements.

the Health Statement, Union Security will investigate to determine whether the Health Statement contained material inaccuracies. App, *infra,* 3a; R. 306-308, 332-333. If it learns that the cause of death was the result of a pre-existing condition not disclosed on the Health Statement, Union Security denies the claim. R. 310, 312. If the cause of death is unrelated to any of the conditions listed on the Health Statement or if the death occurs outside of the one-year contestability period, Union Security pays the claim without further inquiry. R. 307, 349, 352.

The denial of a claim because of an undisclosed pre-existing condition is an exceedingly rare occurrence. In 1991, for example, Union Security received 134 claims on credit life coverage sold by First Alabama and denied only the one involved in this case. R. 998-1000. In 1992, it received 119 claims on coverage sold through First Alabama and paid all but one, which was a suicide excludible under the insurance contract. R. 1000, 1003. In 1993, it received 113 claims on coverage sold by First Alabama and paid all but four, two of which were suicides. R. 1003. Union Security's nationwide statistics are similar. In 1992, it received a total of 7108 claims and paid all but 91, 36 of which were suicides. R. 1014, 1024-1026. In 1993, it received 6998 claims and paid all but 89, 41 of which were suicides. R. 1025-1026. In other words, when suicides are excluded, Union Security's denial rate has been less than 1%.

2. *Coleman Crocker's Pre-Existing Medical Conditions And His Knowledge Of The Effect Of Those Conditions On His Insurability.* Respondent Evelyn Crocker is the widow of Coleman Crocker. Mr. Crocker was a smoker (R. 667) who suffered from Parkinson's disease throughout the 31 years that Mrs. Crocker had known him (App., *infra,* 4a; R. 566). In addition, Mr. Crocker had a history of heart disease. See generally App., *infra,* 4a; R. 352, 605-606. Specifically, in 1984 he was hospitalized and ultimately underwent a by-pass operation. R. 564-565. Then in 1988, he had to be carried

by ambulance to the Mobile Infirmary, where he underwent an emergency balloon angioplasty. R. 568-569, 593-594. In March 1989, he again had to be transported by ambulance to the Mobile Infirmary, where he had an angiogram performed. R. 595. Throughout this period, Mr. Crocker was on a variety of heart medications (R. 594-596) and was attended by at least half a dozen doctors (R. 600).

In 1988, the Crockers learned that Mr. Crocker's medical conditions would adversely affect his ability to obtain affordable insurance. At that time, their regular insurance agent, Larry Adams, discussed with them the possibility of changing policies. During that conversation, Adams asked Mr. Crocker various questions about his health. When he learned that Mr. Crocker was a smoker and suffered from heart disease, Adams advised Mr. Crocker against attempting to change policies. He told the Crockers that, as a result of the health problems, the premiums on any new policy would be too high. R. 662-663, 667-668.

3. *The Crockers' Purchase Of Credit Life Insurance From Union Security.* In October 1990, two years after learning about the difficulty Mr. Crocker would have in obtaining affordable insurance, the Crockers approached Samuel Taylor, the branch manager of First Alabama, Choctaw's Gilbertown branch, for purposes of obtaining a consolidation loan. App., *infra,* 3a; R. 536-537, 571. In conjunction with the loan, the Crockers decided to purchase credit life insurance. App., *infra,* 3a-4a.[6]

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[6] There is a dispute of fact as to whether Taylor told the Crockers that credit life was a requirement of obtaining the loan. Compare R. 514, 530-531, 541 (Taylor's testimony that he made no such statement and that whether or not the debtor purchases credit life is not a factor in determining whether to approve a loan) with R. 572, 575 (Mrs. Crocker's testimony that Taylor said that credit life was required). It is undisputed, however, that the Crockers had always purchased credit life insurance when they took out loans. R. 535-536, 570-571, 572-573, 612. It also is undisputed that the Crockers affirmatively wanted credit

Because the Crockers' loan was for more than $10,000, they each were required to execute a Health Statement as a prerequisite to obtaining credit life insurance through Union Security. Taylor accordingly filled out a Health Statement for each of the Crockers, checking each of the nine "NO" boxes to indicate that neither of them suffered from any of the listed medical conditions. App., *infra,* 4a.[7] At the closing, Taylor explained to the Crockers the nature of each of the documents they were signing, including the Health Statements. R. 509-510, 543, 575, 603-604. He did not rush them or otherwise prevent them from carefully reviewing the documents before they signed them. See R. 522, 542-543, 597-598, 610. Mr. Crocker nevertheless signed his Health Statement, which inaccurately reflected that he had not suffered either from heart disease or a nervous disorder. R. 511, 599-600, 606. Mrs. Crocker saw Mr. Crocker sign the document. R. 607.

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life for this loan without regard to Taylor's alleged representation. R. 572-573.

[7] There is a dispute of fact as to whether Taylor specifically asked the Crockers each of the health questions and then filled in the "NO" box for each question after receiving their negative responses. Compare R. 504-506, 522 (Taylor's testimony that he asked the Crockers the health questions and was told that they had none of the nine conditions) with R. 576-578 (Mrs. Crocker's testimony that Taylor never asked her husband the health questions). There also is a dispute of fact as to whether Taylor actually knew that Mr. Crocker indeed had suffered from both heart disease and a nervous disorder. Compare R. 523, 544-545, 555 (Taylor's testimony that, at the time he filled out the form, he had no recollection of Crocker having been ill in the past) with R. 589-592, 615 (Mrs. Crocker's testimony that Taylor knew that Mr. Crocker had suffered from heart disease) and R. 637-638, 640-641 (bank teller's testimony that she overheard Taylor discussing Mr. Crocker's heart condition with Mrs. Crocker two years prior to filling out the Health Statements). These disputes are beside the point here because there is no evidence either that Union Security had authorized Taylor to fill out the Health Statement without asking the health questions or that it had authorized him to fill out Health Statements inaccurately.

Because the Crockers had signed the Health Statements indicating that neither of them suffered from a pre-existing condition, Taylor was authorized to issue each of them a certificate of insurance summarizing the terms of the First Alabama group policy (R. 349, 442-443, 447)[8] and to add the one-time $1,659.61 premium to their indebtedness (R. 329, 512). Accordingly, as of the time of the closing, the total debt (including interest over the life of the loan) was $21,873. C. 298.[9]

Shortly after the closing, Taylor sent the Crockers the loan papers. R. 632. The Crockers did not read the loan papers or even check to see what was included in the package; they simply filed the papers away. R. 632-633. As it turned out, Taylor had not sent them their certificates of insurance. R. 327-328, 544. Unbeknownst to Union Security (and in direct contravention of its expectations (see R. 326-327, 448) as well as those of First Alabama (see R. 746-747)), the president of First Alabama, Choctaw had made the unilateral decision not to send certificates of insurance to covered debtors and therefore not to provide such certificates to First Alabama, Choctaw's branch offices (R. 747-748). Nevertheless, as far as Union Security was concerned, coverage was in force. R. 349.

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[8] The opinion below contains a statement to the effect that Union Security does not issue policies to its insureds. See App., *infra*, 3a. Although technically correct (in the context of group policies), that statement conveys the inaccurate impression that Union Security does not provide certificates of insurance.

[9] The opinion below mistakenly states that Taylor received a commission from Union Security for the sale of credit life insurance to the Crockers and others. See App., *infra*, 3a. The record does not support that statement. Although Taylor received the modest sum of between $600 and $800 annually from the sale of credit life insurance (see R. 540), the record reflects that those amounts were paid by First Alabama pursuant to its "Credit Life Incentive Plan" and subject to a maximum set by Alabama banking regulations (see C. 328-330).

4. *Mr. Crocker's Death and the Denial of Mrs. Crocker's Claim.* On August 28, 1991, approximately nine months after the closing, Mr. Crocker died of a heart attack. The official cause of death was "acute myocardial infarction/coronary artery disease." C. 307. Mrs. Crocker then made a claim for the $14,563 remaining on the loan. App., *infra,* 4a; R. 629-630; C. 306. As part of the process of making a claim, Mrs. Crocker provided Union Security with the death certificate. App., *infra,* 4a; R. 513-514, 548. Because Mr. Crocker had died within the policy's one-year contestability period and because the cause of death was related to one of the conditions listed on the Health Statement, Union Security investigated the claim. R. 351. Its designated representative contacted the office of the doctor who signed the death certificate and learned that Mr. Crocker had been suffering from heart disease at the time he signed his Health Statement. R. 321, 351-352; C. 304. On the basis of that information, Union Security denied Mrs. Crocker's claim and informed her that the portion of the premium attributable to Mr. Crocker would be refunded. App., *infra,* 4a; C. 318. Union Security instructed First Alabama, Choctaw to make the refund. R. 346-347, 739. Unfortunately, for unknown reasons, First Alabama, Choctaw did not immediately make the refund as instructed. R. 739. After suit was filed and the president of First Alabama, Choctaw learned that the refund had not been made, the bank credited the premium amount plus interest against the loan balance. R. 739-740, 742-746.

5. *Proceedings Below.* Following Mr. Crocker's death, Mrs. Crocker ceased making payments on the loan. After she was four months in arrears, First Alabama, Choctaw sent her a collection notice. R. 744. Mrs. Crocker subsequently filed suit in Choctaw County against First Alabama, Choctaw and Union Security. Her amended complaint alleged that Taylor, as agent for both First Alabama, Choctaw and Union Security, had misrepresented to the Crockers that, in the

event Mr. Crocker died, the credit life insurance would pay off the balance of the loan. The amended complaint also alleged that Taylor "concealed" from the Crockers the fact that he was disclosing inaccurate information on the Health Statement, that they had to be in good health to get the insurance, and that, if Mr. Crocker were to die of heart problems or a nervous disorder, coverage would be denied. C. 180.

The case went to trial on February 14, 1994. At trial, there was no evidence that Union Security had authorized Taylor or any other agent to fill out health statements inaccurately. Nor was there any evidence that Union Security had instructed Taylor or any other agent to "conceal[]" the fact that inaccuracies on a health statement could result in denial of a claim. Instead, the evidence of wrongdoing focused exclusively on Taylor (and to a limited extent on First Alabama, Choctaw). At the same time, however, Mrs. Crocker's counsel salted the trial with evidence of Union Security's out-of-state location, its foreign ownership, and its sizeable aggregate premiums (over the entirety of the contract with First Alabama) and low loss ratios for credit life insurance sold through First Alabama. R. 294, 297, 365-371, 420-422, 442; C. 313-316.[10] Much of that evidence was introduced over Union Security's objection. See R. 361-363, 421, 422.

During summation, Mrs. Crocker's attorneys repeatedly reminded the jury of these irrelevant, yet highly inflammatory facts. Thus, within seconds of beginning his summation, one of Mrs. Crocker's counsel stated gratuitously: "The home office of Union Security is in Atlanta and some other thing over across Europe or somewhere, owns them or something."

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[10] A loss ratio is the percentage of annual earned premiums paid out in claims. R. 366. It does not take into account the costs of selling and servicing the insurance policies and so is *not* a measure of the profitability of that line of insurance.

R. 822. And, more dramatically, one of Mrs. Crocker's other attorneys made the, by-now classic, "send a message" speech, complete with "us-against-them" rhetoric :

> [H]ere's what's going to happen. There's going to be a phone call made. As soon as your verdict comes in, **there will be a phone call to Atlanta; there will be a phone call to Europe**, and it's one of two things: Boys, its back to business as usual. That jury didn't understand. We were able to skillfully confuse them enough. Or, there is another message. It's very simple also: Boys, in **a small county, in a small state**, we got caught cheating, stealing, and lying. We better put a stop to this.
>
> Very simple. You can't help the message. It's going out. **The message is going straight to Atlanta, then straight to Europe**. The question, the only thing you can control, is the contents of that message.

R. 900-901 (emphasis added). See also R. 889.

The same attorney repeatedly reminded the jury of the total amount of premiums generated from the sale of credit life insurance over the course of Union Security's contract with First Alabama, as if the sale of that product was itself the tort for which punishment was being sought. See R. 894-896.

After summations, the case was submitted to the jury against both defendants. After deliberating a mere 36 minutes (see R. 927-928), the jury returned a general verdict, holding the defendants jointly and severally liable in the amount of $5 million. R. 929; C. 735.

Both defendants filed motions for judgment n.o.v., new trial, and remittitur. After conducting a post-trial evidentiary hearing pursuant to *Hammond* v. *City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), the trial court sustained the jury's finding

of liability and rejected the defendants' various grounds for a new trial. App., *infra,* 14a-27a. Finding the $5 million verdict excessive, however, the court indicated that it would grant a new trial unless Mrs. Crocker agreed to a remittitur of $2 million. *Id.* at 26a.

The trial court expressly recognized the extraordinary nature of the jury's verdict, stating (App., *infra,* 15a):

> February 17, 1994, will long remain as a day of demarcation for the assessment of damages by juries in lawsuits tried in Choctaw County, Alabama, for the verdict in this case is far in excess of any previously awarded.
>
> The reverberations resulting from the jury verdict in this cause will be long lasting throughout the local legal community and the county. When the verdict was read, gasps were heard, sobs sounded, hearts pounded loudly (some from glee, others from alarm), for from this day forward, it would forever be remembered that large punitive damage awards were alive and well, not only in Alabama, but, for the first time, in Choctaw County.

In reviewing the size of the punitive damages award, the trial court noted that "[t]his case involved misrepresentations made *by the agent* for defendants as well as concealment *by the agent* of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance." App., *infra,* 19a (emphasis added). In other words, the defendants were held liable under a theory of vicarious liability; there were *no* direct actions on the part of Union Security that were the basis for liability. The court further observed:

> This appears to be an isolated incident insofar as both defendants are concerned in failing or refusing to pay a credit life insurance claim premised upon the fraud of their agent. **There is no evidence either defendant engaged in similar misrepre-**

> **sentations or concealments/suppressions in their dealings with other credit life insureds.** In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants. This factor mitigates against the award of very significant punitive damages being assessed against the defendants.

Id. at 20a (emphasis added). See also *id.* at 23a ("[T]his Court has found no repeated wrong-doing by either defendant. This was an isolated incident."). The court also noted that, even before Mrs. Crocker had filed her claim, Union Security had revised the Health Statement to include the specific admonition that "Untruthful answers may result in denial of claims." *Ibid.* (quoting revised Health Statement).

Despite these various mitigating factors, however, the trial court concluded that a punitive award of $3 million was not excessive under the circumstances. The court based that conclusion principally upon its findings that (1) Mrs. Crocker had suffered "grievous" harm because "all the expectations for which [she] and her deceased husband had bargained and paid for, totally failed" and (2) in 1991 Union Security realized a net gain of $1.29 million from the sale of credit life insurance nationwide. App., *infra,* 20a, 21a.

After both defendants filed notices of appeal, First Alabama, Choctaw entered into a pro tanto settlement with Mrs. Crocker, pursuant to which it paid her $1 million. App., *infra,* 2a. Union Security then successfully moved for a remand to the trial court for purposes of determining whether a punishment of $2 million (*i.e.*, the remainder of the judgment) was excessive in relation to Union Security's conduct, particularly in view of the lesser amount paid by its more culpable co-defendant. The trial court declined to conduct a new hearing, instead issuing a short order holding that $2 million was not excessive as to Union Security. App., *infra,* 28a-31a.

A five member panel of the Alabama Supreme Court then affirmed in all respects. App., *infra,* 1a-13a. The court rejected Union Security's argument that the evidence did not support the finding of liability for the underlying tort, stating that "the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." App., *infra,* 6a.

The Alabama Supreme Court also upheld the trial court's conclusion that a $2 million punishment against Union Security was not excessive. It explained: "The trial court's order reflects a thorough analysis of the jury verdict and, after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies." App., *infra,* 11a-12a.

In concluding that Union Security's conduct needed to be "exorcise[d]," the court relied entirely upon observations it had made in *Huff* v. *United Ins. Co. of Am.*, 1995 WL 317676 (1995), which was decided more than 3½ years *after* Union Security had denied Mrs. Crocker's claim. The court stated in *Huff:*

> *As the law in Alabama currently stands,* an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy.

> Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement could prevent situations like the one in this case.

App., *infra*, 12a (quoting *Huff*, 1995 WL 317676, at *2) (emphasis added).[11]

Union Security timely filed an application for rehearing, which was overruled on September 8, 1995. App., *infra*, 13a. After the Alabama Supreme Court denied a stay of execution of the judgment, this Court granted a stay pending the timely filing and disposition of a petition for writ of certiorari. See 64 U.S.L.W. 3269 (Oct. 10, 1995).

REASONS FOR GRANTING THE PETITION

The petitioner in *BMW* argues that the $2 million punitive exaction in that case is disproportionate to the potential and actual harm suffered by the plaintiff and bears no reasonable relationship to the gravity of its alleged misconduct. The instant case presents an equally, if not more, extreme example of a punitive judgment that cannot be justified by these or any other relevant criteria.

To begin with, one would be hard pressed to read the opinion of the Alabama Supreme Court and conclude that

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[11] We cannot help observing at this point that the Alabama Supreme Court appears to have overlooked entirely the fact that, under Alabama law, ordinary life insurance policies are incontestable after a maximum of two years (see Ala. Code § 27-15-4) and that credit life insurance polices are incontestable after only one year (see Ala. Ins. Reg. No. 28, § VI(J)(2)). When a policy contains a short contestability period, the "benefits" of taking the policyholder at his or her word do not "lie solely in favor of the insurance company and its agent." To the contrary, dishonest policyholders have a tremendous incentive to lie on their health statements, knowing that their fraud will be rewarded if they can survive the short contestability period.

Union Security did anything wrong at all, let alone something that warrants a $2 million fine. There was no evidence in this case that Union Security authorized Taylor or any other agent to falsify Health Statements. Nor was there evidence that it instructed Taylor or any other agent to suppress the (seemingly obvious) fact that, if the insured signs a Health Statement that fails to disclose a pre-existing condition, his or her claim might be denied.[12]

The *only* conduct of Union Security with which the Alabama Supreme Court found fault was its practice of investigating those claims made during the one-year contestability period that appear to be related to a condition listed on the Health Statement. See App., *infra,* 12a. That was not one of Mrs. Crocker's theories of liability, however. Her amended complaint alleged misrepresentation and concealment only (see C. 180) and the case was submitted to the jury on those theories alone (see R. 904). Moreover, as the Alabama Supreme Court recognized, Union Security's practice simply was not wrongful in Alabama at the time Mrs. Crocker made her claim. App., *infra,* 12a.[13] It is the

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[12] To the extent a fraud was committed at all in this case, Union Security was the *victim,* not the perpetrator. Union Security has nothing to gain, and much to lose, when a Health Statement fails to disclose a pre-existing medical condition. Whenever a claim is made outside of the one-year contestability period, it is obligated to pay the claim regardless of whether the cause of death was related to an undisclosed pre-existing condition. And, if the claim is made within the contestability period and denied because of a false or inaccurate Health Statement, the premium is refunded.

[13] To the contrary, Alabama law expressly provides (although it presumably no longer means) that insurers may deny coverage because of misstatements or omissions in the application if (1) the misstatements or omissions are "[f]raudulent"; (2) the misstatements or omissions are "[m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer" or (3) "the insurer would not have issued the policy had the application been accurate." Ala. Code § 27-14-7. Courts

height of unfairness, not to mention irrationality, to justify a multi-million dollar sanction by reference to conduct that was lawful at the time it took place.[14]

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construing this provision have concluded that, with limited exceptions, it permits insurers to rely on the truthfulness of the applicant's answers to health questions and to defer investigation until a suspicious claim is made. See, *e.g.*, *Stephens* v. *Guardian Life Ins. Co.*, 742 F.2d 1329, 1334 (11th Cir. 1984) ("[i]nsurers are not required to investigate when the information furnished by the insured reveals nothing out of the ordinary"). The regulation that makes credit life insurance coverage incontestable after one year (Ala. Ins. Reg. No. 28, § VI(J)(2)) is confirmation that, during the first year of a policy, there is nothing unlawful about denying a claim based on misstatements in the application that were not discovered until the claim was made.

[14] Finally, it merits mention that the practice condemned by the Alabama Supreme Court is both economically efficient and eminently sensible. If it is not permissible to defer investigating until the time a suspicious claim is made, Union Security (and numerous other similarly situated insurers) would be left with three equally undesirable options. It could, before issuing coverage, independently verify the accuracy of every one of the 2,000 to 6,000 Health Statements that it receives each month, an extremely costly and time-consuming proposition that would likely necessitate an increase in premiums paid by all debtors, including the overwhelming majority who are honest. Alternatively, Union Security could simply pay all claims, regardless of whether the cause of death appears related to an undisclosed pre-existing condition. That option too would likely cause an increase in premiums and would surely provide an incentive for more people to falsify health statements. Finally, it could simply stop issuing policies that generate premiums so modest as to make it infeasible to investigate the applicant's health before issuing coverage.

We might add that the Alabama Supreme Court's antipathy toward Union Security's approach is particularly misguided in the context of credit life insurance. Unlike ordinary life insurance, time is often of the essence in the credit life context. A person seeking a loan (and credit life) to buy a house, a car, or an engagement ring may not have the time for the insurer to complete a thorough investigation (the timing of which could be largely determined by the responsiveness of the applicant's physician).

In addition to bearing no reasonable relationship to the gravity of the alleged misconduct, the $2 million punishment in this case is entirely disproportionate both to the actual and potential harm to Mrs. Crocker and to whatever "profit" that Union Security could be said to have earned.

As for the harm to Mrs. Crocker, it bears noting at the outset that, if the Health Statement had been accurate, Union Security simply would not have issued coverage. App., *infra,* 3a; R. 342-343, 509, 522-523. It is conceivable that some other insurer might have issued coverage at a rate that would reflect the risk to that insurer, but there is no evidence in this case that insurance would have been available at any price or that, if such insurance were available, the Crockers would have been willing to pay what it would have taken to obtain it. Accordingly, the $14,563 loan balance would appear to overstate Mrs. Crocker's harm. Putting this problem to one side, however, the punitive damages imposed against Union Security alone are **137** times the amount remaining due on the loan.

There also is good reason to conclude that the approximately $830 premium paid on behalf of Mr. Crocker overstates the harm to Mrs. Crocker since Union Security instructed First Alabama, Choctaw to refund that premium (R. 346-347, 739), and First Alabama, Choctaw ultimately did so (R. 739-740, 742-746). Putting that point aside, however, the punitive damages are over **2,400** times the premium attributable to Mr. Crocker and are over **1,200** times the total joint premium paid by the Crockers.

The trial court did suggest that Mrs. Crocker suffered "grievous" harm as a result of the failure of her expectations. App., *infra,* 20a. However, there was no testimony whatever about mental anguish and no attempt on the part of Mrs.

Crocker to quantify the value of her failed expectations.[15] Accordingly, there is no basis in the record for assuming that Mrs. Crocker suffered (and that the jury awarded) any significant amount of "failed expectation" damages, and hence there is nothing to render less startling the ratio of punitive damages to the actual or potential harm to Mrs. Crocker. Contrast *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 (1993) (referring to "record evidence" that would support a finding that the potential harm to the respondent could have ranged from $5 million to $8.3 million).

The punitive damages also are totally disproportionate to whatever gain Union Security could be said to have earned as a result of the sale of insurance to the Crockers. The record contains evidence that Union Security receives only 4% of the premium for credit life coverage sold through First Alabama (with the remainder going to First Alabama). Supp. C. 5. See also R. 354-355 (testimony of Union Security's claims manager that Union Security receives 6% and that First Alabama receives whatever is left after expenses and the payment of claims). In other words, on the sale of the Crockers' joint coverage, Union Security earned a whopping $66.38. The $2 million punitive exaction is more than **30,000** times that figure. Although First Alabama, Choctaw's president testified (inaccurately) that Union Security gets about 50% of the premium (see R. 722-723), that testimony does not alter the fact that the punitive damages bear no relationship to Union Security's income from the sale of credit life insurance to the Crockers. Even assuming that Union Security received 50% of the premium, the punitive damages are a breathtaking **2,400** times that amount.

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[15] We note in this regard that one of Mrs. Crocker's lawyers has been making her loan payments since shortly after she received the collection notice from First Alabama, Choctaw (R. 631) and that there is no evidence in the record that she incurred any penalties or additional interest charges as a result of having been in arrears.

The trial court observed that the punitive damages were not disproportionate to the $1.29 million net gain earned in 1991 by Union Security from the sale of credit life insurance nationwide. App., *infra,* 21a. But that observation only serves to demonstrate why the punitive damages are utterly unsustainable. As the trial court recognized, the tort here was "an isolated incident." *Id.* at 20a, 23a. As such, it is irrational to compare the punitive damages to Union Security's total annual net gain from the perfectly lawful activity of selling credit life insurance.

Even if it ordinarily might be appropriate to consider total net revenues notwithstanding the absence of proof that the tort was more than an isolated incident, it is undisputed here that Union Security pays over 99% of the non-suicide claims it receives. R. 998-1000, 1003, 1014, 1024-1026. Accordingly, it is inappropriate to treat the entire $1.29 million in net earnings as ill-gotten gains. Given the 99% payment rate, the *most* that even arguably could be used for a comparison based on 1991 profits would be $12,900. The punitive damages are **155** times that amount.

Of course, we wholeheartedly agree with the petitioner in *BMW* that it is inappropriate to punish for out-of-state transactions under Alabama law and hence that it is inappropriate to evaluate a punishment with reference to out-of-state profits. The record reflects that Union Security earned only $67,019 in 1991 from the sale of credit life through First Alabama. Supp. C. 5.[16] The punitive damages are roughly **30** times that amount. And, if that figure is reduced to reflect

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[16] There is no evidence in the record as to what Union Security earned through all Alabama agents.

the 99% payment rate, the punitive damages would be 3,000 times the resulting $670.19 figure.[17]

In short, the conduct here was not wrongful, let alone egregious, and the punishment bears no reasonable relationship to either the harm to Mrs. Crocker or the "gain" to Union Security. Because the case is, in these respects, quite similar to *BMW*, the Court should hold Union Security's petition and dispose of it as appropriate in light of its decision in that case. If the Court does not reach the excessiveness issue in *BMW*, we respectfully submit that this case would be an excellent one in which to address that exceedingly important and recurring issue.

CONCLUSION

The petition for certiorari should be granted.

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[17] By making these comparisons, we by no means accept the contention that it is appropriate to punish in one case for the effect of a defendant's conduct on other individuals who have the right to bring their own cases. Like the petitioner in *BMW*, we believe that whatever punishment is appropriate for the scope of the defendant's conduct should be apportioned across the total number of potential plaintiffs so as to avoid both duplicative punishment and the unfairness of making a defendant, who might be exonerated in other cases, pay a statewide (or nationwide) punishment in the first case in which it is held liable.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX A

UNION SECURITY LIFE INSURANCE COMPANY

v.

Evelyn CROCKER.

No. 1931672.

Supreme Court of Alabama.

Sept. 8, 1995.

BUTTS, JUSTICE.

Evelyn Crocker, individually and as the beneficiary and administratrix of the estate of Coleman S. Crocker, sued Union Security Life Insurance Company ("Union Security") and First Alabama Bank of Choctaw ("First Alabama"), alleging claims of fraud, concealment, breach of contract, bad faith, and a scheme to defraud, in relation to First Alabama's sale of credit life insurance policies and Union Security's failure to pay benefits under those policies. Mrs. Crocker subsequently amended her complaint to reflect that she was proceeding only in an individual capacity and not as the the beneficiary and administratrix of the estate of Coleman S. Crocker.

Mrs. Crocker alleged that Sammy Taylor, as an agent for both First Alabama and Union Security, induced her to buy a credit life insurance policy on the life of her husband although he knew that Mr. Crocker had a history of heart problems and was uninsurable. She further alleged that Taylor failed to ask the Crockers for medical information and that Taylor falsified the information he put on the credit life insurance application. Mrs. Crocker also alleged that, after her husband's death, Union Security breached its contract of insurance by failing to pay benefits and that this failure was part of a scheme of intentional fraud in relation to the selling of credit life policies.

The trial court dismissed the breach of contract and bad faith claims, and the fraud claims went to trial. The jury

returned a verdict of $5 million for Mrs. Crocker, and the trial court entered a judgment upon this verdict. Both First Alabama and Union Security moved for a J.N.O.V., a new trial or, in the alternative, a remittitur, and moved to stay execution of the judgment until their post-judgment motions were ruled upon. After a hearing, the trial court denied the defendants' J.N.O.V. motion and further denied the defendants' motion for new trial, subject to Mrs. Crocker's acceptance of a $2 million remittitur. Mrs. Crocker accepted the remittitur, and Union Security alone appealed.

During the pendency of this appeal, Mrs. Crocker entered into a pro tanto release with First Alabama, accepting $1 million in exchange for releasing First Alabama from any further liability in the case. When Union Security discovered this agreement, it filed in this Court a motion for an "emergency remand," arguing that the verdict was excessive against it as the sole remaining defendant and demanding a hearing in the trial court on the matter. This Court initially denied the motion, but later, after reconsideration, granted it and remanded the case for the circuit court to review the judgment for excessiveness, in accord with *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989). On remand, the circuit court entered an order reaffirming its original *Hammond* order, without conducting a second hearing. Union Security's appeal on the merits was then returned to the active docket of this Court.

I.

Union Security, which is headquartered in Atlanta, Georgia, and which is part of a European holding company, sells credit life insurance through lending institutions nationwide, including First Alabama. Various First Alabama loan officers are contractually authorized in this state to take applications for credit life insurance from their customers and to issue certifications of insurance for approved applications, showing that the coverage is in effect.

Union Security requires that, for credit life policies issued in conjunction with First Alabama loans in excess of $10,000, the customer execute a "Statement of Debtor's Physical Condition" before credit life coverage is issued. This health disclosure statement authorizes Union Security to receive any information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, as long as this information is for the purpose of evaluating or underwriting the application for credit life coverage.

The health disclosure statement has nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. Union Security requires that all of these boxes be checked "no," indicating that the applicant has had no prior history of particular illnesses before it will issue credit life coverage for the applicant. Union Security does not examine the health records of those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine "after the fact" whether coverage should have been issued. Union Security does not issue a written policy to those applicants who are accepted for coverage.

In October 1990, Union Security was selling credit life insurance in conjunction with loans made by First Alabama in Choctaw County, Alabama. Union Security authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants, and it paid him a commission of the premiums on the credit life policies that it issued pursuant to the applications he obtained.

The Crockers knew Taylor and contacted him at the bank to inquire about obtaining a consolidation loan. Taylor advised Mrs. Crocker to pick up an application from the bank and complete it; they picked up one and then they met with

Taylor. During this meeting, Taylor completed a separate health disclosure statement for each of the Crockers. He had premarked each of the nine health questions on the statements by checking the "no" boxes, indicating that neither of the Crockers suffered from any past illnesses. Mr. Crocker, however, had been suffering from Parkinson's disease for some years and had also undergone serious heart surgery twice within the last 10 years. The Crockers signed the respective health disclosure statements that Taylor had prepared for them.

Mr. Crocker died from heart disease in August 1991. Mrs. Crocker submitted a death certificate to Union Security and attempted to collect the credit life policy benefits. Union Security investigated the claim and denied coverage, based on Mr. Crocker's history of heart disease.

II.

The first issue presented is whether the trial court erred in denying Union Security's motions for a summary judgment and a directed verdict on Mrs. Crocker's two claims involving alleged misrepresentation and concealment by Taylor. Union Security points out that Mrs. Crocker was required to establish (1) that Taylor had a duty to disclose an existing material fact; (2) that Taylor suppressed that fact; (3) that Taylor had actual knowledge of the fact and of its materiality; (4) that Mrs. Crocker's lack of knowledge of the material fact induced her to act; and (5) that she suffered actual damage as a proximate result. *Hardy* v. *Blue Cross & Blue Shield of Alabama*, 585 So.2d 29 (Ala. 1991).

The existence of a duty to disclose is a legal question and is to be discerned from the confidential relations of the parties or from the particular circumstances of the case. Ala. Code 1975, § 6-5-102; *Interstate Truck Leasing, Inc.* v. *Bender*, 608 So.2d 716 (Ala. 1992). Some factors the court may consider are the relationship of the parties, the value of the particular facts, and the relative knowledge of each party.

Bender. Where the accused has superior knowledge of the fact and the other party is being induced to take action that that party might not have taken had he or she known the fact, the obligation to disclose is particularly compelling. *Bender*.

The evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage. Taylor testified that he knew that if he indicated on the application form that Mr. Crocker suffered from any health problems, the credit life policy would not be issued to him. Taylor stated that he knew the credit life policy included a one-year period wherein Union Security could investigate the Crockers' medical history after issuing the policy, even if it had not done so before issuing coverage. Taylor testified that he received a commission from each credit life policy that was issued, regardless of whether the company ultimately paid benefits to the insured or not.

Although Taylor denied knowing that Mr. Crocker had a history of heart disease, other witnesses testified that Taylor did know of Mr. Crocker's past heart surgeries and had inquired about his condition during his periods of convalescence. Although Taylor denied knowing that Mr. Crocker suffered from Parkinson's disease, the evidence shows that Mr. Crocker had experienced constant and noticeable tremors for years and had displayed this symptom of the disease on the day Taylor filled out the application for credit life insurance. There was also evidence that Taylor and his wife had vacationed with the Crockers and that they had visited them in their home during the years that Mr. Crocker suffered from heart disease and Parkinson's disease. In spite of this, Taylor nevertheless indicated on the health disclosure statement that the Crockers were in good health and had no history of illness; doing so enabled him to issue

the insurance policy to them and collect the commission from the policy for himself.

There is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.

III.

Union Security next argues that the trial court committed several errors during the trial that require a reversal of the judgment against it.

Union Security first argues that the trial court erred in allowing into evidence the fact that it is a foreign-owned entity. Union Security claims that this evidence was injected into the trial as evidence of wealth, and it points out that a jury cannot consider the financial position of the defendant in assessing punitive damages. The questioning at issue occurred as follows:

> "Q. Mr. Hall, I believe you said that a Ms. Calik is your underwriter in your department and works under you.
>
> "A. Yes, she is.
>
> "Q. She is employed by American Securities Insurance, is she not?

"A. She worked for an American Securities Group at Union.

"Q. American Securities Group and Union Security Life, they are both owned by the same company, are they not?

"A. Yes, the Group is not an insurance company. The insurance company is under that Group.

"Q. The Group is owned by Ferris Enterprises out of Europe. Is that correct?

"Mr. Robertson [counsel for Union Security]: Your honor, I'm going to object to the relevance of that question.

"The Court: What is the question, Mr. Morris?

"Mr. Morris [counsel for Crocker]: The question was that American Securities and Union—I mean, the American Security group that Ms. Calik works for in [Mr. Hall's] Department, and the Union Security Life Insurance Group are owned by Ferris Enterprises, which is a European company that owns both of them, but both people work in there.

"The Court: What's the purpose of this line of questioning?

"Mr. Morris: We are going to call Ms. Calik. She says in her deposition she worked for a separate company. I think we need to show that they are one and the same, basically.

"Mr. Robertson: Judge, we don't see where that is at all relevant to what we're here on.

"The Court: You don't need to get too far down the line. Go ahead.

"Mr. Morris: I won't. Go ahead.

"Q. [By Mr. Morris]: Isn't that true?

"A. That's not the name of the company, sir. It's Fortis, F-O-R-T-I-S.

"Q. Fortis. I'm sorry. Fortis Enterprises. All right. Now, either American Securities and/or the American Securities and Union Security do business with a number of banks. You don't do business with just First Alabama Bank?

"A. That's correct."

In this testimony, there was no mention of wealth in the questions, nor can we find any intimation of the surplus or net income of the corporations. We note that counsel for Mrs. Crocker mentioned in closing argument that Union Security's parent company was European; however, these remarks did nothing to establish any evidence of the corporation's wealth, and Union Security did not object to them. The trial court has broad discretion in ruling on matters in argument of counsel, *United Companies Fin. Corp.* v. *Brown*, 584 So.2d 470 (Ala. 1991), and, after reviewing the record surrounding this exchange, we cannot hold that the trial court erred in allowing the foregoing questions.

Union Security next argues that the trial court erred in allowing Mrs. Crocker to submit evidence of the amount of premiums First Alabama receives, on a statewide basis, from marketing credit life policies with its loans.

Mrs. Crocker submitted evidence that, for the years 1988, 1989, 1990, and 1991, First Alabama generated almost $40 million in gross premiums through the sale of credit life insurance. Mrs. Crocker also established that the loss ratios of Union Security with First Alabama through these four

years were, respectively, 20.6%, 21.1%, 16.3% and 17.0%. She also presented expert testimony indicating that a 50% loss ratio was a more reasonable balance between the insurer and the insureds.

Mrs. Crocker points out that fraud loss ratios are admissible in evidence, *Independent Life & Accident Insurance Co.* v. *Harrington*, [Ms. 1921093, August 5, 1994] --- So.2d ---- (Ala. 1994), and argues that she could not compute the loss ratios for the jury without showing the gross earned premiums. Moreover, Union Security did not request a jury charge to limit consideration of the $40 million figure. After reviewing the record concerning the loss ratios, and the evidence as a whole, we find no error in the admission of evidence concerning First Alabama's gross earned premiums.

Union Security next argues that the trial court erred in refusing to charge the jury that punitive damages are not recoverable for innocent or mistaken fraud. Union Security requested the following charge: "The Plaintiff is not entitled to punitive damages if you find that Sammy Taylor committed a fraud upon the plaintiff that was committed mistakenly, innocently or negligently." The trial court rejected this proposed charge and ultimately instructed the jury:

> "Now, ladies and gentlemen of the jury, if you are reasonably satisfied that the defendants have been shown by clear and convincing evidence to be guilty of an intentional misrepresentation, deceit or concealment of a material fact, which the defendants had a duty to disclose, which was gross, oppressive or malicious, and committed with the intention on the part of the defendants of thereby depriving the plaintiff of property or legal rights or otherwise causing injury, and the plaintiff did suffer injury or damage as a proximate result of such fraud, then in your discretion you may award the plaintiff punitive damages in addition to any actual damages you find from the evidence the plaintiff did suffer."

With this, the trial court correctly set out the very clear, specific limits on the type of intentional fraud that must underlie an award of punitive damages; nothing in this instruction would lead a jury to believe that an innocent or mistaken fraud could support a punitive damages award, so there was no reason to think an additional instruction would be needed. The trial court's refusal of a requested written instruction, even though it is a correct statement of law, is not a cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge. See Rule 51, Ala.R.Civ.P. We therefore find no merit in Union Security's argument on this point.

IV.

Union Security argues that the jury's verdict resulted from obvious bias, passion, and prejudice, and that it is due another hearing on the verdict. The trial court is peculiarly qualified to pass judgment on whether the verdict is the result of bias or prejudice. *Davidson* v. *Mobile Infirmary*, 518 So.2d 675 (Ala. 1986). Following the hearing on the question of excessiveness of the verdict, the trial court stated in its order that it considered "the presentation of the case by the respective attorneys; the demeanor, candor, and apparent truthfulness of the witnesses; the attentiveness by members of the jury and the 'feel' for fairness vel non in the atmosphere wherein the trial is conducted." Although the trial court went on to find that the verdict was excessive, it did so based solely on its determination that the award exceeded an amount necessary to accomplish society's goal of punishment and deterrence, based on the facts of this case. Our review of the record reveals nothing that contradicts the trial court's own observations made during the trial; thus, we find no error in its determination.

Union Security next argues that the trial court failed to properly review the jury verdict for excessiveness in accordance with the established standards set out in *Hammond*

v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989).

In ruling on a motion for remittitur in a punitive damages case, the trial court must make essentially two separate but related determinations: whether the amount of the jury's verdict was set by a properly functioning jury and, if so, whether the verdict was nevertheless excessive as a matter of law because it exceeds an amount that will accomplish society's goals of punishment and deterrence. *Hammond.* We have already upheld the trial court's determination that the verdict was not tainted or influenced by bias, passion, prejudice, corruption, or other improper motive or cause. The question now is whether the jury verdict was excessive as a matter of law.

In ruling on this issue, the trial court could consider several factors, including (1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as the harm that actually has occurred; (2) the degree of responsibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (3) the profitability of the defendant's conduct; (4) the financial position of the defendant; (5) the costs of litigation; (6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Green Oil.*

The trial court's order following the *Hammond* hearing shows that the court extensively reviewed its copious trial notes, as well as the evidence and relevant case law on comparative punitive damages awards. The trial court's order reflects a thorough analysis of the jury verdict and, after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and

deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies. This Court recently observed the nature of this inequity in *Huff* v. *United Ins. Co. of America*, [Ms. 1931516, May 26, 1995] --- So.2d ----, ---- (Ala.1995), wherein we stated:

> "As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement could prevent situations like the one in this case."

Union Security argues that it is entitled to a second *Hammond* hearing for a reassessment of the *Green Oil* factors in light of the fact that First Alabama had settled its liability. We note, however, that in its first *Hammond* order, the trial court specifically found that Union Security and First Alabama were jointly and severally liable for the judgment and that there was no evidence that "an award of $5,000,000 would place either defendant in receivership or bankruptcy." The judgment is now, of course, reduced to $2 million dollars and, in its second *Hammond* order, the trial court confirmed that it had already thoroughly reviewed the *Green Oil* factors and considered a second hearing unnecessary. After reviewing all of the record, we agree that the trial court's findings following the first *Hammond* order took into

consideration the *Green Oil* factors as they applied to Union Security jointly with First Alabama and as they applied to Union Security separately. We therefore find no error in the trial court's refusal to conduct a second hearing before issuing its second *Hammond* order after First Alabama had settled its liability to Mrs. Crocker.

Based on the foregoing, we affirm the trial court's judgment against Union Security.

AFFIRMED.

ALMON, SHORES, KENNEDY, and COOK, JJ., concur.

HORNSBY, C.J., and HOUSTON and INGRAM, JJ., recused.

On Application For Rehearing

OPINION MODIFIED (BY SUBSTITUTION OF PAGES 1-16); APPLICATION OVERRULED.

APPENDIX B

IN THE CIRCUIT COURT OF

CHOCTAW COUNTY, ALABAMA

EVELYN CROCKER,

PLAINTIFF,

vs.

CASE NO.
CV-92-064 K

UNION SECURITY LIFE
INSURANCE COMPANY, AND
FIRST ALABAMA BANK,

DEFENDANTS.

O R D E R

On February 17, 1994, a verdict was returned in this cause whereby the jury found for the plaintiff and against the defendants and assessed plaintiff's damages at $5 million. No request was made for the jury to be polled. The Court entered judgment on the same date for the plaintiff, Evelyn Crocker, and against the defendants, Union Security Life Insurance Company and First Alabama Bank, and assessed the plaintiff's damages at five million dollars ($5,000,000.00).

Subsequently, each defendant filed a motion for judgment notwithstanding the verdict or for new trial or remittitur. Initially, the Court set the said motions for hearing on June 1, 1994, which, by agreement of all parties, were continued until June 30, 1994. It was expressly agreed by all parties that said motions would remain pending in the trial court for ruling until July 22, 1994; and, by express consent of all parties, which said consent appears of record in this cause,

the said motions remain pending in the trial court for ruling until July 29, 1994.

The plaintiff's amended complaint was very precise and succinct. The trial of this cause was not especially lengthy, lasting only approximately four (4) days. The jury deliberated just thirty-six (36) minutes. However, February 17, 1994, will long remain as a day of demarcation for the assessment of damages by juries in lawsuits tried in Choctaw County, Alabama, for the verdict in this cause is far in excess of any previously awarded.

The reverberations resulting from the jury verdict in this cause will be long lasting throughout the local legal community and the county. When the verdict was read, gasps were heard, sobs sounded, hearts pounded loudly (some from glee, others from alarm), for from this day forward, it would forever be remembered that large punitive damage awards were alive and well, not only in Alabama, but, for the first time, in Choctaw County.

The Court has carefully reviewed the pleadings, the testimony, and the oral charge in this cause; has read each post-trial brief and affidavit filed in this matter; has considered the testimony, evidence and arguments presented in the post-trial hearing; and has reviewed the various and numerous authorities submitted to the Court post-trial. For purposes of any appellate review, ALL of the foregoing are to be considered as matters of record in this cause, and the same are hereby ordered to be made a part of any record on appeal.

The Court conducted a charge conference in this clause. The forms of verdicts were reviewed by the Court with counsel. There were no exceptions to the forms of verdicts by any party nor was there a timely request by any party for an itemized verdict. This is noted because there were claims for both compensatory and punitive damages by the plaintiff, and the Court in its oral charge to the jury instructed on

compensatory as well as punitive damages. Thus, this Court is somewhat in the same posture as was the Supreme Court of the United States in *Pacific Mutual Life Insurance Co. vs. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991), in attempting to ascertain the amount of punitive damages assessed by the jury. In *Haslip*, 111 S.Ct. at 1037, n.2, the Court stated, "...it is *probable* that the general verdict for respondent Haslip contained a punitive damages component of not less than $840,000. [Emphasis added.]" However, in the instant case it is more difficult for this Court to attribute the amount of the award to punitive damages, for the Court's oral charge to the jury on compensatory damages contained, inter alia, an element of damages for mental anguish. This is stated to illustrate that even though there certainly were punitive damages included in the jury's verdict in this cause, the exact amount thereof is not mathematically ascertainable. Nevertheless, in accordance with Section 6-11-23(b) CODE OF ALABAMA, 1975, as amended, the Court did conduct a post-trial hearing "concerning the amount of punitive damages."

JUDGMENT NOTWITHSTANDING THE VERDICT

As was stated in *Baptist Memorial Hospital vs. Bowen*, 591 So. 2d 74, 77 (Ala. 1991), "A motion for JNOV is properly granted only when: 1) there is either (a) a complete absence of proof on a material issue of fact or (b) no factual controversy upon which reasonable people could differ; and 2) the movant is entitled to a judgment as a matter of law. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 773 (Ala. 1984). Furthermore, all reasonable inferences must be considered in a light most favorable to the nonmovant. Id." *See, also, Isbell vs. Smith*, 558 So.2d 877, 883 (Ala. 1989). Suffice it to conclude that there was significant conflict in the testimony presented in this cause and that the jury was convinced by clear and convincing evidence that there were facts supporting the plaintiff's claim. Too, the Court did not deny the motions for directed verdicts filed by the respective defendants without

carefully reviewing the testimony and reflecting upon the plaintiff's cause of action.

All of the above being considered and understood, it is, therefore, ORDERED, ADJUDGED, and DECREED that defendant First Alabama Bank's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied. It is, further, ORDERED, ADJUDGED, and DECREED that defendant Union Security Life Insurance Company's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied.

MOTION FOR NEW TRIAL OR REMITTITUR

The Court observed the demeanor and credibility of the witnesses who testified in this cause, as well as each member of the jury during the course of the trial. At all times the jury appeared attentive. The witnesses seemed to be truthful and testified without regard to bias or prejudice. Admittedly, the plaintiff was emotional during periods of the trial, but the subject matter of her concern, i.e, the prospect of losing her home when she thought it would be paid for by her deceased husband's credit life insurance, causes any display of her emotions to be understandable. Obviously, the jury, drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants.

As they perceived the evidence, it is obvious that the jury was shocked by the conduct of the defendants. In other words, from the jury's viewpoint the harm resulting to the plaintiff from the defendants' conduct was grievous. The cause of action in this case was not for negligence or breach of contract, but was for fraud. In reflecting upon some aspects of the evidence in this cause, it was undisputed that Sammy Taylor, duly authorized employee of defendant First Alabama Bank and licensed agent of defendant Union Security Life Insurance Company, never gave the plaintiff or her deceased husband, Coleman Crocker, either a certificate of

life insurance or a copy of the policy of credit life insurance which they had purchased. In fact, Mr. Taylor did not even know the terms of the credit life insurance policy which he sold the plaintiff and her deceased husband, nor had he ever even seen such a policy of credit life insurance. Taylor even testified he didn't know "when" or "if" people were covered who purchased this type credit life insurance from the defendants. Perhaps, Mr. Taylor's position is understandable in light of the fact that he did not know the terms and conditions of the credit life insurance policy issued by Union Security Life Insurance Company nor had anyone from the insurance company ever explained to him the provisions of such a policy or the procedures relative to same. This agent's limited knowledge may make his actions understandable, but such does not make the defendants' conduct excusable. One can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth on the Statement. Both of these defendants were in this business to make money, and the sale of credit life insurance was profitable to both.

As stated in *Industrial Chemical vs. Chandler*, 547 So.2d 812, 837 (Ala. 1988),

> Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example. But in levying a punitive award, the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to "fair" punishment; in other words, "although punitive

> damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. vs. Hornsby*, 539 So.2d 218 (Ala. 1989), citing *Maryland Casualty Co. vs. Tiffin*, 537 So.2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988), and *Roberson v. Ammons*, 477 So.2d 957 (Ala. 1985). Hence, we must ask, after the return of a jury award of punitive damages, what process is due the defendant to insure that he has been provided "fundamental fairness" at the hands of the law and to insure that society's goals of punishment and deterrence have been accomplished?

The Court will now review the issue of whether the punitive damages awarded herein were excessive. In doing so, the Court will follow the directives of the Supreme Court of Alabama as outlined in *Green Oil Co. vs. Hornsby* 539 So.2d 218 (Ala. 1989), and *Hammond vs. City of Gadsden*, 439 So.2d 1374 (Ala. 1986).

1. *Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred.*

This case involved misrepresentations made by the agent for defendants as well as concealment by the agent of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance. The plaintiff and her husband, Coleman Crocker, obtain a loan from defendant First Alabama Bank and purchased credit life insurance from loan officer Sammy Taylor. The policy of insurance was with defendant Union Security Life Insurance Company. The total amount of the loan, including the interest and cost of the credit life insurance, was, to-wit, twenty-one thousand eight hundred seventy-three dollars ($21,873.00). The cost to the plaintiff and her husband for the credit life insurance was one

thousand six hundred fifty-nine and 61/100 dollars ($1,659.61). The loan was obtained on, to-wit, October 15, 1990. Coleman Crocker died on August 28, 1991, and the insurance company refused to pay First Alabama Bank the outstanding balance of the loan in the amount of, to-wit, fourteen thousand five hundred sixty-three dollars ($14,563.00) because of a pre-existing heart disease, which did not appear on the Union Security Life Insurance Company form entitled Statement of Debtor's Physical Condition. The collateral for the loan was a double-wide mobile home in which the plaintiff and her deceased husband resided. The harm which resulted in this case is that the defendant Union Security Life Insurance Company failed to pay the claim of the plaintiff, *i.e.*, the balance of the loan to creditor-defendant First Alabama Bank, upon the death of plaintiff's husband, and thus not only was the loan, which was secured by a mortgage on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed. The damages to plaintiff were grievous and, therefore, damages should be substantial.

2. *The degree of reprehensibility of the defendant's conduct should be considered.*

This appears to be an isolated incident insofar as both defendants are concerned in failing or refusing to pay a credit life insurance claim premised upon the fraud of their agent. There is no evidence either defendant engaged in similar misrepresentations or concealments/suppressions in their dealings with other credit life insureds. In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants. This factor mitigates against the award of very significant punitive damages being assessed against the defendants.

3. *If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.*

It is without dispute that both defendants and their agent made a profit from the sale of credit life insurance. Mr. Taylor testified he received an incentive for selling credit life insurance for defendant Union Security Life Insurance Company while in the employ of defendant First Alabama Bank ($600-$800 annually). At the post-trial hearing there was evidence that the defendant Union Security Life Insurance Company realized a net gain from the sale of credit life insurance in the amount of $1,290,000.00 during the year 1991. Defendant First Alabama Bank, system wide, earned total commissions for both credit life and credit accident and health in the year 1991 in the amount of $1,228,000.00, while First Alabama Bank-Choctaw received commissions on credit life insurance in 1991 in the amount of $53,000.00. The Court notes that upon instructions from defendant Union Security Life Insurance Company, defendant First Alabama Bank refunded both the principal and the interest in terms of the proportion of the premium that was attributable to Mr. Crocker by crediting it to the Crockers' loan. However, this action was not taken until after the litigation was initiated.

4. *The financial position of the defendant would be relevant.*

At the post-trial hearing, testimony was elicited that at the end of 1993 defendant Union Security Life Insurance Company had a net worth of $24,340.000.00. Testimony further revealed that in the event the entire five million dollar ($5,000,000.00) judgment was to be paid by this defendant, payment would come from its unassigned surplus which totaled $14,990,000.00 at the end of 1993. This defendant contends that payment by it of the judgment would impair its competitiveness and adversely affect its ratings. Insofar as defendant First Alabama Bank is concerned, there was no

evidence presented relative to its financial position. However, the Court takes judicial notice that it is a large financial institution with branches throughout, at least, much of the state of Alabama. Certainly, there was no evidence that an award of $5,000,000 would place either defendant in receivership or bankruptcy. Because the judgment was awarded the plaintiff against both defendants, it is significant that each is jointly and severally liable.

5. *All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.*

According to plaintiff's Post-Judgment Review of Punitive Damages brief, Mrs. Crocker's attorneys have already expended approximately $35,000. Compare this amount ($35,000) with the balance which was due on the plaintiff's loan, to-wit, $14,563, and one readily understands the significance of the following statement in *Principal Financial Group vs. Thomas*, 585 So.2d 816, 818 (Ala. 1991):

> A lack of a means of litigating because the contract amount involved is too small to obtain lawyers who can afford to file suit to recover only the contract amount would potentially deprive an insured, who thinks her case is just, of her day in court. This may free insurance adjusters from fairly investigating and reviewing small claims and may result in a loss of faith in the judicial system. Is this likely harm slight or grievous? Grievous.

Interestingly, the record reveals that plaintiff had previously engaged the services of another attorney to represent her in this dispute. Perhaps, that attorney did not have the necessary financial resources or time to pursue this claim. Accordingly, the Court finds that the verdict should be high enough to award not only a plaintiff such as Mrs. Crocker, but also her attorneys, significant recovery to litigate this type of case.

6. *If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.*

There has been no evidence produced that criminal sanctions have been imposed upon either defendant.

7. *If there have been any other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.*

There was no evidence presented of any other civil actions against either defendant with circumstances similar to those presented in this case.

As stated previously, this Court has found no repeated wrong-doing by either defendant. This was an isolated incident. Additionally, defendant First Alabama Bank has taken steps to remedy the conduct complained by the plaintiff. This defendant has developed a manual explaining credit life insurance and in 1993 distributed a copy of this manual to each bank and loan officer in the First Alabama Bank system. Training sessions have been held by this defendant wherein these manuals are explained to each loan officer. Among the instructions contained in the manual is one whereby there is a reminder that the insured debtor must be given a copy of the insurance certificate. First Alabama-Choctaw now requires the issuance of insurance certificates. Defendant Union Security Life Insurance Company has revised its UND-131 form Statement of Debtor's Physical Condition. The revised form UND-131A, contains the following language which was not printed on the original form: "Untruthful answers may result in denial of claims." These forms were shipped to defendant First Alabama Bank in December, 1990.

As was stated in *Nationwide Mutual Insurance Co. vs. Clay*, 525 So.2d 1339, 1344 (Ala. 1987),

> On state law grounds, Nationwide argues that punitive damages should bear some particular mathematical relationship to compensatory damages. However, we have repeatedly held that punitive damages need not *necessarily* bear any particular relationship to compensatory damages. *U-Haul Company of Alabama v. Long*, 382 So.2d 545 (Ala. 1980). We have said that decisions on punitive damages must be made on a case-by-case basis, and it is clear from our cases that this Court is willing to uphold substantial jury awards for damages, even in excess of $1,000,000, when the facts warrant such an award.

Thus, there is no particular relationship between the amount of compensatory damages and the punitive damages.

The relative brevity of this Order does not reflect the substantial amount of time this Court has devoted to this matter. The Court's copious notes of the trial of this case have been read and re-read; even portions of the transcribed testimony of some of the witnesses, and the oral charge have been reviewed. Every brief has been carefully considered, each having been read at least once. Numerous cases have been perused for, inter alia, comparative punitive damage awards, and the Court has conducted independent research. The Court has arrived at the conclusion that two of the most compelling considerations in developing this Order are: 1.) the right to a trial by jury is a fundamental, constitutionally guaranteed right (see Art. I, Section 11, Constitution of Alabama of 1901); and 2.) applying the criteria approved in *Haslip*, *supra*, a defendant's constitutional due process rights are not violated by a jury's award of punitive damages which are subject to *meaningful and adequate review* by the trial court. Implicit in the trial court's review of any punitive damage award are personal observations of the Court considering the presentation of the case by the respective attorneys; the demeanor, candor and apparent truthfulness of

the witnesses; the attentiveness by members of the jury; and the "feel" for fairness vel non in the atmosphere wherein the trial is conducted. All of these things have been considered from the unique position which was occupied by the trial court.

In the significant precedent case of *Green Oil Co. v. Hornsby*, *supra*, our Supreme Court stated as follows (at page 222):

> Because the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future, the proper amount of punitive damages rests largely within the jury's discretion. However, although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Maryland Casualty Co. v. Tiffin*, 537 So.2d 469 (Ala. 1988); *City Bank of Alabama v. Eskridge*, *supra*; *Roberson v. Ammons*, 447 So.2d 957 (Ala. 1985).

and

> Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals.

Following *Green Oil Co. v. Hornsby*, *supra*, the Supreme Court in *General Motors Corp. v. Johnston*, 592 So.2d 1054, 1060 said:

> The presumption of correctness of a jury verdict can be overcome only by a *clear* showing that the amount of the award is excessive. *Green Oil Co.*, 539 So.2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may substitute its judgment for that of the jury." *Green Oil Co.*, 539 So.2d at 222, citing *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Hammond*, 493 So.2d 1374.

The Court concluded its opinion by ordering a substantial remittitur.

Based on a thorough review of this case and on the amount of punitive damages awarded in other cases, this Court is of the opinion that the punitive damages award in this case is excessive and the Court orders a remittitur of $2,000,000. Even though a remittitur is necessary, this Court is of the opinion that the evidence supports a punitive damages award of $3,000,000. The determination of excessiveness is based upon applying the law that punitive damages should not exceed an amount necessary to accomplish society's goal of punishment and deterrence for the facts and circumstances of the case. The Court finds that an award of $3,000,000 will accomplish society's goals of punishment and deterrence in this case.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Motions for New Trial filed by defendant United Security Life Insurance Company and by defendant First Alabama Bank be, and the same hereby are, denied, subject to the acceptance by the plaintiff of a remittitur of $2,000,000 within twenty-eight (28) days of the date of this Order. Acceptance of a remittitur of $2,000,000 by the plaintiff will result in a judgment in her favor against the defendants for the sum of $3,000,000.

DONE this the 29th day of July, 1994.

HARDIE B. KIMBROUGH,
PRESIDING JUDGE

FIRST JUDICIAL CIRCUIT
OF ALABAMA

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Larry Morris and Clay Hornsby
William Utsey
John W. Thompson, II
Jim Robertson and Rodney Cate
Michael D. Smith and Cooper Shattuck

APPENDIX C

IN THE CIRCUIT COURT OF
CHOCTAW COUNTY, ALABAMA

EVELYN CROCKER,

PLAINTIFF,

vs. CIVIL ACTION
CV-92-064 K

UNION SECURITY LIFE
INSURANCE COMPANY and
FIRST ALABAMA BANK,

DEFENDANTS.

ON REMANDMENT FROM THE
SUPREME COURT OF ALABAMA

This trial court received the following Order from the Supreme Court of Alabama, dated the 26th day of October, 1994:

IN THE SUPREME COURT OF ALABAMA
October 26, 1994

1931672

Union Security Life
Insurance Company

v. Choctaw Circuit Court
CV-92-064K

Evelyn Crocker

ORDER

The appellant having filed a motion to reconsider this Court's order of October 3, 1994, denying the appellant's

motion for a remand of the above styled matter to the Circuit Court of Choctaw County for the purpose of holding a hearing in accord with *Hammond v. City of Gadsden*, 4339 So.2d 1374 (Ala. 1986) and *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), and the same having been submitted and considered by the Court,

> IT IS CONSIDERED AND ORDERED that the motion to reconsider is granted and this matter is remanded to the Circuit Court of Choctaw County to review the judgment for excessiveness in accord with *Hammond* and *Green Oil*, *supra*, with return on this remand to be made within thirty days from the date of this order.
>
> Maddox, Almon, Shore, Houston, Steagall, Kennedy, and Cook, JJ., concur. Hornsby, C.J., and Ingram, JJ., recuse themselves.

This humble trial Court wishes to respectfully respond to said Order rather than taking any action relative to same because, stated simply, this Court can not procedurally discern why this Order was issued to *this Court*.

Initially, it is noted that there is no cause pending in the circuit court of Choctaw County, Alabama, styled *Union Security Life Insurance Company vs. Evelyn Crocker*. The Supreme Court's Order refers to case no. CV-92-064 K in the circuit court of Choctaw County, Alabama. The official court file in the office of the circuit clerk of Choctaw County, Alabama, in case no. CV-92-064 K is styled *Evelyn Crocker v. Union Security Life Insurance Company, and First Alabama Bank*.

Next, this trial Court has, in fact, already conducted a hearing and entered an order in accord with *Green Oil Co., vs. Hornsby*, 539 So.2d 218 (Ala. 1989), and *Hammond vs. City of Gadsden*, 439 So.2d 1374 (Ala. 1986); see fourteen (14) page ORDER attached hereto and made a part hereof. In attempting to follow the directives of *Green Oil* and

Hammond, *supra*, the trial Court, *inter alia*, addressed seven (7) criteria relative to each of the said defendants (see attached ORDER beginning at page 6 thereof). The trial Court ordered a remittitur of two million dollars ($2,000,000.00), which, if accepted by the plaintiff, would result in a judgment in favor of the plaintiff and against the defendants for the sum of three million dollars ($3,000,000.00).

Finally, the *last* filing, over which the *trial* court had *jurisdiction*, was an Acceptance Of The (trial) Court's Remittitur filed by the plaintiff and her attorneys of record. The said Acceptance resulted in a judgment in favor of the plaintiff and against each of the said defendants, jointly and severally, in the sum of three million dollars ($3,000,000.00). There is absolutely nothing else subsequently filed in the circuit court except an appeal by defendant Union Security Life Insurance Company to the Supreme Court of Alabama. It is this Court's understanding, based upon the record in the *trial* court, that there is presently pending in the circuit court of Choctaw County, Alabama, an unsatisfied judgment in favor of the plaintiff in the sum of three million dollars ($3,000,000.00), against each of said defendants, with defendant Union Security Life Insurance Company having filed an appeal relative to said judgment to the Supreme Court of Alabama. Absolutely nothing else is of record in the *trial* court.

This Court will note, being acutely familiar with every aspect of this cause at the trial court level, that these two (2) defendants never positioned themselves in an adversarial position to each other during the entire course of the trial proceedings. Their theories, defenses, and positions were not only similar, but the evidence presented by them as well as the arguments made, were intricately connected. To quote one of my favorite local trial lawyers, "They were as two hearts that beat as one" in defending this lawsuit.

Again, as stated at the outset, this Court seeks further guidance to comply with the Supreme Court's Order dated October 26, 1994, for this Court views the undeniable record in the *trial* court to be a judgment against *both* defendants for the *entire* sum of three million dollars ($3,000,000.00). Certainly, there has been no judicial action or ruling in the trial court in this case to cause any other interpretation by any court.

At no time prior to the entry of the attached ORDER by this Court did any party present any argument or cite any authority that the trial court should, or even could, apportion damages among joint tort-feasors at a *Green Oil* and *Hammond*, *supra*, hearing. A fortiori, no party presented any such argument or cited any authority to the *trial* court subsequent to the entry of said ORDER and while the trial Court still had jurisdiction of the subject matter. Of course, the court is well aware that damages are not apportioned among joint tort-feasors, and joint tort-feasors are jointly and severally liable for the entire amount of damages and the plaintiff need not elect to seek damages from one or the other. *See Buchanan v. Collier*, 555 So.2d 134 (Ala. 1989). In this cause two tort-feasors acted jointly to produce indivisible injury so there can be no apportionment of damages.

This Court feels compelled to reaffirm its attached ORDER, as it does not propose to retreat from or retract its prior holdings and statements, although such was opined recently by one of the illustrious justices.

Respectfully submitted this the 4th day of November, 1994.

HARDIE B. KIMBROUGH,
PRESIDING JUDGE

FIRST JUDICIAL COURT
OF ALABAMA